

Order

Entered: January 28, 2003

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

2001-29

Proposed Amendment of Rule 702 of the Michigan Rules of Evidence

On order of the Court, this is to advise that the Court is continuing to consider whether to amend Rule 702 of the Michigan Rules of Evidence. A proposed amendment having been published at 465 Mich 1309 (2002), and the Court having given due consideration to the comments received in writing and at a public hearing, this notice is given to afford any interested person the opportunity to comment on the form or the merits of two new alternative proposals. Before adoption or rejection, these proposals will be considered by the Court at a public hearing. Notice of future public hearings will be posted at www.courts.michigan.gov/supremecourt. The original proposal also remains under consideration.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language of Rule 702 would be amended as indicated below.]

[Alternative A]

Rule 702 Testimony by Experts

If ~~the court determines that recognized~~ scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[Alternative B]

Rule 702 Testimony by Experts

- (a) Criteria for Admitting Expert Testimony. If the court determines that ~~recognized~~ scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education; may testify thereto in the form of an opinion or otherwise if the court also determines that the testimony is reliable and will

assist the trier of fact. In making that determination, the court shall examine the testimony and the basis for the testimony, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all the following factors:

- (1) Whether the testimony and its basis have been subjected to scientific testing and replication.
 - (2) Whether the testimony and its basis have been subjected to peer review publication.
 - (3) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the testimony and its basis are consistent with those standards.
 - (4) The known or potential error rate of the testimony and its basis.
 - (5) The degree to which the testimony and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
 - (6) Whether the basis for the testimony is reliable and whether experts in that field would rely on the same basis to form an opinion or make a decision.
 - (7) Whether the opinion or the underlying methodology is relied on by experts outside the context of litigation.
- (b) *Conflict with Statutory Rule.* This rule determines the admissibility of testimony by an expert unless applying this rule would contravene a legislatively declared principle of public policy involving something other than the orderly dispatch of judicial business.

Staff Comment: On January 23, 2002, the Court published a proposed amendment of MRE 702. 465 Mich 1309 (2002). That proposal remains under consideration. The two additional proposals published today differ significantly from the earlier proposal and from each other. They reflect consideration of the public comments on that earlier proposal.

The Alternative A proposed amendment of MRE 702 would conform the Michigan rule to FRE 702, as amended effective December 1, 2000. The added language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

The Alternative B proposed amendment combines features of current MRE 702, MCL 600.2955, and *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). The specific criteria in subrule (a) are drawn from MCL 600.2955(1) and, indirectly, *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). Whereas MCL 600.2955(1) limits its own application to expert scientific opinions in tort cases, this proposed rule would

apply to all expert testimony in all cases. A court-made rule of evidence that is broader in scope than MCL 600.2955 is permissible if it does not conflict with any substantive statutory rule of evidence. See and compare *McDougall v Schanz, supra*, and proposed subrule (b).

The staff comments are published only for the benefit of the bench and bar and are not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2003: Clerk's Office, Michigan Supreme Court, P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to File No. 2001-29. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 28, 2003

Corbin R. Davis

Clerk